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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TRACY PAUL, Defendant and Appellant.	B202211 (Los Angeles County Super. Ct. No. NA072928)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed as modified and remanded with directions.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Sarah J. Farhat and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

PROCEDURAL BACKGROUND

On February 2, 2007, an information was filed charging appellant Tracy Vaughn Paul in count 1 with the murder of Branden Terrell (Pen. Code, § 187, subd. (a)), and in count 2 with possession of a firearm as a felon (Pen. Code, § 12021, subd. (a)(1)).[1] The information alleged under count 1 that appellant had personally used a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), (d)), and that the offense had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)); in addition, the information alleged that appellant had two prior convictions within the scope of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), two prior convictions for a serious felony (§ 667, subd. (a)(1)), and four prior convictions (§ 667.5, subd. (b)). Appellant pleaded not guilty.

On April 12, 2007, a jury found appellant guilty as charged, and found the gang and gun-related allegations to be true. Appellant stipulated that he was a felon for purposes of the trial on count 2, and later admitted the truth of the prior conviction allegations. On June 13, 2007, the trial court sentenced appellant to imprisonment for a total term of 116 years and eight months to life.[2]

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[1] All further statutory citations are to the Penal Code, unless otherwise noted.

[2] Under count 1, the trial court imposed a term of 25 years to life, trebled pursuant to the Three Strikes law, plus 25 years to life for the discharge of a gun causing great bodily injury (§ 12022.53, subd. (d)), 10 years for the gang allegation (§ 186.22, subd. (b)(1)(C)), and five years for appellant's prior convictions (§ 667, subd. (a)); under count 2, it imposed a consecutive sentence of eight months plus one year for appellant's prior convictions (§ 667.5, subd. (b)).

FACTS

A. *Prosecution Evidence*

Laquesha Lang testified as follows: During the evening of December 8, 2005, she was driving her car along Spaulding Avenue in Long Beach when she saw two of her friends, Brandon Terrell and Charibonnet Martin, standing on a sidewalk. After they waved to her, she parked her car, left it, and joined them. As they talked, Lang noticed that a car with three male occupants -- one of whom resembled appellant -- drove past them two times. Moments later, she saw appellant walking toward them. Lang did not know appellant, and she did not believe that either Terrell or Martin recognized him. She did not hear appellant say anything. Appellant pointed a gun at Terrell and fired several shots at him. Terrell fled across the street into Orizaba Park, where he fell down, and appellant retreated in a different direction.[3]

Charibonnet Martin was determined by the trial court to be unavailable as a witness, and portions of her preliminary hearing testimony were presented to the jury. According to Martin, at approximately 9:00 p.m. on December 8, 2005, she talked to Terrell and Lang on Spaulding, which borders Orizaba Park. After a green car drove past, a black male approached them. The male said to her, "What's up, cuz?" He then asked Terrell "where he was from." Martin understood this to be a question about whether Terrell belonged to a gang. Terrell, who was unaffiliated with any gang, did not respond. The male said, "I'm a Rolling 20 Crips," pointed a gun at Terrell, and fired several shots. Terrell and Martin ran across the street into Orizaba Park, and the male left in the direction from which he had come. Terrell collapsed in the park. As Martin stood over him,

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[3] Although Lang did not identify appellant as the shooter in a photographic lineup, she identified him at the preliminary hearing in January 2007 and at trial.

she saw the green car emerge from an alley and drive away. Terrell later died of multiple gunshot wounds.

Mark Williams testified that he was Terrell's friend, and that he learned about the shooting after the incident. Williams denied that he conversed with appellant and Whisper Ginn about three days after the shooting, and that appellant then told him that he had killed someone near Orizaba Park. Williams also denied that he reported such statements to Long Beach Detective Robert Gonzales. A recording of Detective Gonzales's interview with Williams was submitted to the jury. During the interview, Williams stated that he was a friend of Terrell's, and that Terrell was not a gang member. After the shooting, Williams talked to Ginn and appellant, whom he knew to be a member of the Rolling 20s Crip gang with the nickname "J-Dub."[4] Appellant told Williams that he had "[j]ust laid this dude down at the park. Just . . . drove up there over there by the park, seen him, got out, walked up on him, shot him." Appellant also told Williams that he made a gesture to Terrell and then "banged on him," which Williams understood as a reference to "gangbanging."

Ginn testified that she was an ex-member of the Rolling 20s Crips. According to Ginn, her cousin phoned her shortly after Terrell's murder and told her that there had been a gang-related shooting. She acknowledged that she spoke to appellant the following day about the shooting in Orizaba Park, but denied that she recalled his remarks.

A recording of Ginn's pre-trial interview with Long Beach Detective Scott Lasch was submitted to the jury. During the interview, Ginn stated that appellant was involved with the Rolling 20s Crips. After the murder, her cousin told her that a member of the Insane Crips -- a rival gang of the Rolling 20s Crips -- had been

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[4] The gang is also called "the Rolling 20s" and the "Rolling Twenties Crips."

shot in Orizaba Park. The next day, appellant came to her house with a newspaper, which he rarely possessed. When Ginn mentioned the shooting in Orizaba Park, appellant said, "It was crackin down there." Appellant asked Ginn to look for an article describing the incident in his newspaper. After Ginn found no article about the incident, appellant said, "We'll see what comes in the papers. It should arrive any day." Appellant also said, "Man, that nigger is dead," and, "I made sure that he was dead." Ginn had heard of gang members who kept newspaper articles as trophies of their crimes. Ginn also said that she was present when appellant spoke to Williams two to four days after the murder, but did not overhear their remarks.

Long Beach Police Detective Hector Gutierrez, a gang expert, provided testimony about the Rolling Twenties Crip gang. He opined that appellant was a member of the gang, and that Terrell's murder was committed for the benefit of the gang. According to Gutierrez, members of the gang commit violent crimes against rival gangs and anyone they perceive as a threat in order to enhance their reputation and deter police investigations.

B. *Defense Evidence*

Appellant presented no evidence.

DISCUSSION

Appellant contends (1) that Martin's preliminary hearing testimony was improperly admitted; (2) that he received ineffec7tive assistance of counsel; (3) that there was sentencing error; and (4) that his sentence constitutes cruel and unusual punishment. As explained below, these contentions are mistaken.

A. *Preliminary Hearing Testimony*

Appellant contends that the trial court erred in determining that Martin's preliminary hearing testimony was admissible because she was unavailable as a

witness.[5] He argues that admitting the testimony was error under California law and contravened his right of confrontation under the Sixth Amendment of the United States Constitution.

1. *Governing Law*

The key question before us is whether the prosecution exercised reasonable diligence in trying to procure Martin's appearance at trial. (Evid. Code, §§ 240, subd. (a)(5), 1291.) "The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. (*Barber v. Page* (1968) 390 U.S. 719, 725; accord, *Ohio v. Roberts* (1980) 448 U.S. 56, 74[, reversed on other grounds in *Crawford v. Washington* (2004) 541 U.S. 36, 62].) California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate

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[5] Subdivision (a) of Evidence Code section 1291 provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

the missing witness. (Evid. Code, § 240, subd. (a)(5) . . .).” (*People v. Cromer* (2001) 24 Cal.4th 889, 892 (*Cromer*).)[6]

Generally, “‘[w]hat constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word “diligence” connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve [the] presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent’s affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation].’ [Citation.]” (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

The trial court’s ruling regarding due diligence presents a mixed question of fact and law. (*Cromer, supra,* 24 Cal.4th at p. 893.) To the extent the trial court resolved conflicts in the evidence regarding historical fact, we review the trial court’s findings for the existence of substantial evidence. (*Id*. at pp. 894, 900.) To the extent the trial court concluded that the historical facts “amount[ed] to due diligence by the prosecution,” we review the determination de novo. (*Id*. at p. 900.)

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6 Respondent contends that appellant forfeited his contention under the Sixth Amendment by failing to raise it before the trial court. Because the crux of this contention is identical to appellant’s contention under state law -- namely, that the prosecution failed to show due diligence in trying to secure Martin’s presence at trial -- we see no forfeiture. As our Supreme Court has explained, an appellant does not forfeit a claim of federal constitutional error when “the new arguments [on appeal] do not invoke facts or legal standards different from those the trial court was asked to apply.” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1289, fn. 15.) That is the case here.

2. *Evidence and Ruling*

Martin testified at the first preliminary hearing in the underlying matter, which occurred on October 19, 2006. She stated that shortly after Terrell's murder, she was interviewed by detectives, who presented her with a photographic lineup. Martin's mother, who was present during the interview, urged her not to get involved. Although Martin picked out two photos as potentially depicting Terrell's killer, she declined to circle the photos and sign the lineup. During the preliminary hearing, Martin stated that she did not want to testify at the hearing.

After the first preliminary hearing, the prosecutor dismissed the case and refiled it. Only Lang and Ginn testified at the second preliminary hearing, which occurred on January 19, 2007. On February 2, 2007, the prosecutor filed the underlying information, and the trial court initially set appellant's trial for March 29, 2007.

On April 5, 2007, prior to the selection of the jury, the prosecutor asked the trial court to determine that Martin was unavailable as a witness for the purpose of admitting her preliminary hearing testimony. The sole witness to testify at the due diligence hearing was Detective Gonzales. According to Gonzales, he served Martin -- who is an adult "in her early twenties" -- with a subpoena prior to the first preliminary hearing in October 2006. Follow the hearing, he contacted her once at her workplace in late 2006. On March 19, 2007, he tried to serve her with a trial subpoena at her workplace, but learned from her employer that she had quit the day before his arrival, without leaving any forwarding information. When he went to her residence, no one answered his knocks on her door. He returned to the residence on March 20 and 28, as well as on April 2, but no one answered the door. On April 2, Gonzales tried phoning Martin, and learned that her phone had been disconnected. He asked Detective Hector Gutierrez to visit the residence, and he did so on April 3 and 4; no one answered the door. In addition, Gonzales checked

local hospitals, the Department of Motor Vehicles address database, the Los Angeles County warrant system, and the Los Angeles County Sherriff's Department, all to no avail.

On cross-examination, Gonzales acknowledged that he did not try to find a new address for Martin by means of the internet. He also acknowledged that he did not try to find Martin through her mother, with whom Martin at one time had lived. According to Gonzales, several months prior the due diligence hearing, he had a phone number for Martin's mother, when Martin and her mother lived at a particular address in Long Beach. He learned that the phone number had been disconnected, found that Martin and her mother had moved to a new address, and reestablished contact with Martin. Since October 2006, he had not obtained new information about Martin's mother, who had been uncooperative when he served the subpoenas for the first preliminary hearing.

In determining that the prosecution had exercised due diligence in attempting to secure Martin's presence, the trial court found that Martin, knowing that "ten days before the trial is when the subpoena is to be served, quit her place of employment and vacated her place of [residence] with no further forwarding address."[7]

3. *Analysis*

Because the historical facts are not in dispute, we confront an issue of law, namely, whether Detective Gonzales exercised due diligence in trying to secure Martin's presence in view of her reluctance to testify at the first preliminary

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[7] The trial court determined that Martin was unavailable as a witness under subdivisions (a)(4) and (a)(5) of Evidence Code section 240. As we conclude that the trial court's ruling was correct under the latter provision (see pt. A.3., *post*), we do not address its ruling under the former provision.

hearing. Generally, the prosecution is obliged only to use "reasonable efforts" to locate a witness. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) As our Supreme Court explained in *People v. Hovey* (1988) 44 Cal.3d 543, 564, "we could not properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to . . . simply 'disappear,' long before a trial date is set."

In *People v. Diaz* (2002) 95 Cal.App.4th 695 (*Diaz*), the court addressed an issue similar to that before us. There, a material witness to a gang murder told police officers that she was unwilling to testify at the preliminary hearing. (*Id.* at p. 707.) To secure her presence at the hearing, they falsely told her they were taking her to the police station for an interview, and then drove her to the courthouse. (*Ibid.*) Following the hearing, the officers monitored the witness's location on a weekly basis, and waited until the day of trial to serve a subpoena on her. (*Ibid.*) According to one of the officers, this tactic was necessary because serving the subpoena earlier was likely to have ensured her unavailability. (*Ibid.*) When the officers arrived at her residence, they found that she had disappeared, and their efforts to locate her were unsuccessful. (*Id.* at pp. 706-707.) The appellate court concluded that the officers' efforts to secure the witness's presence were reasonable in face of her "'calculated effort to avoid service of process.'" (*Id.* at p. 707.)

Unlike the witness in *Diaz*, Martin testified at the first preliminary hearing without the need for trickery, and Detective Gonzales contacted her with no evident difficulty in late 2006. Although Martin apparently planned to disappear before appellant's trial, she waited until March 18, 2007 to quit her job. On the record before us, it appears that had Detective Gonzales contacted her before that

date, he would have found nothing amiss.[8] When Gonzales discovered that Martin had disappeared, he engaged in reasonable efforts to locate her. (See *People v. Wise* (1994) 25 Cal.App.4th 339, 344 [officers exercised due diligence in repeatedly trying to serve a subpoena at the witness's known addresses, and contacting the post office, local jail, hospital, and coroner].) Under the circumstances of this case, we conclude that the prosecution's efforts to secure Martin's presence at trial were reasonable.

Appellant's reliance on *Cromer*, *supra*, 24 Cal.4th 889; *People v. Enriquez* (1977) 19 Cal.3d 221 (*Enriquez*), disapproved on another ground in *Cromer*, *supra*, 24 Cal.4th at p. 901, fn. 3, and *People v. Avila* (2005) 131 Cal.App.4th 163 (*Avila*) is misplaced, as they are distinguishable. In *Cromer*, the witness was cooperative at the preliminary hearing, but disappeared two weeks after the hearing. (*Cromer*, *supra*, 24 Cal.4th at p. 903.) Although aware of the disappearance, the prosecution did not attempt to locate the witness until six months later, on the eve of the trial, and responded slowly (and unsuccessfully) to information that the witness might be living with his mother at a known address. (*Id*. at pp. 903-904.) The Supreme Court concluded that the prosecution had failed to establish due diligence. (*Id*. at p. 903) Unlike *Cromer*, Detective Gonzales contacted Martin after the first preliminary hearing, and Martin did not disappear until shortly before the initial date for appellant's trial.

In *Enriquez*, the prosecution's sole efforts to secure the presence of a 17-year old witness was to ask the trial court to issue a bench warrant and make a single inquiry to the witness's mother about his location. (*Enriquez*, *supra*, 19 Cal.3d at p. 236.) Because the prosecution failed to take obvious steps to find

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[8] The record is silent regarding the prosecutor's decision not to call Martin as a witness at the second preliminary hearing, but contains no indication that she was difficult to find.

the witness -- for example, to look for him at his school and at his mother's home -- the Supreme Court found an absence of due diligence. (*Ibid*.) Here, Detective Gonzales made considerable efforts to locate Martin.

In *Avila*, a witness to a gang-related assault testified at the defendant's first trial, and was apparently fearless and cooperative. (*Avila*, *supra*, 131 Cal.App.4th at pp. 167-169.) After the first trial ended in a mistrial, the prosecution waited until the day of the second trial to contact the witness about testifying, and was unsuccessful in locating her. (*Id*. at p. 169.) The appellate court concluded that the prosecution's meager efforts to obtain the witness's presence on short notice was not reasonable, notwithstanding the witness's cooperativeness during the first trial. (*Id*. at pp. 171-172.) Here, in contrast, Detective Gonzales contacted Martin after the first preliminary hearing, and began his efforts to serve her with a subpoena more than two weeks before the actual date of appellant's trial.

Appellant also contends that the prosecutor should have acted more vigilantly to secure Martin's presence by locating her mother. We disagree. "That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [of due diligence] [Citation.]. It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1298.) Here, the record discloses that Martin's mother had vigorously encouraged Martin not to cooperate since the inception of the investigation into Terrell's murder. Under these circumstances, Martin's mother could not be regarded as a reasonable source of information about Martin's location. In sum, the prosecution exercised due diligence in attempting to secure Martin's presence as a witness at trial.

Moreover, even had we found that the admission of Martin's testimony amounted to federal constitutional error, we would find such error harmless. Confrontation Clause violations are subject to the test for prejudice found in

Chapman v. California (1967) 386 U.S. 18. (*People v. Geier* (2007) 41 Cal.4th 555, 608.) Martin, unlike Lang, never identified appellant as Terrell's killer, and her testimony regarding the shooting is essentially cumulative of Lang's. To the extent that Martin provided evidence of appellant's gang-related motive not found in Lang's testimony, Martin's testimony is cumulative of the evidence provided in Williams's and Ginn's recorded police interviews and elsewhere in the record, especially appellant's statement to Williams that he had "banged on" Terrell. In our view, there is no reasonable doubt a rational jury would have found appellant guilty as charged, even if Martin's preliminary hearing testimony had not been admitted.

B. *Ineffective Assistance of Counsel*

Appellant contends that his trial counsel rendered ineffective assistance by failing to raise a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike one of appellant's prior "strikes." In our view, appellant is mistaken.

"In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

Under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12), the decision to strike a prior felony conviction is consigned to the trial court's discretion.

(*Romero, supra*, 13 Cal.4th at p. 504.) The trial court must consider whether, "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part."[9] (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The record discloses only the following facts about appellant's criminal history, aside from his convictions in the underlying action: Appellant was born in 1986. As a juvenile, a petition was sustained against him in 2001 for assault with a deadly weapon causing great bodily injury (§ 245, subd. (a)(1)), and he was placed on probation in his home. In 2004, he suffered a misdemeanor conviction for offensive words in a public place (§ 415, subd. (3)), a felony conviction for vehicle theft (Veh. Code, § 10851, subd. (a)), and two felony convictions for robbery (§ 211). Regarding the robberies, which were charged in a single case, appellant received a three-year suspended sentence, a 78-day jail sentence, and formal probation. After he admitted a probation violation, his probation was revoked, and he apparently served his sentence in prison.

Appellant contends that his trial counsel rendered ineffective assistance in failing to seek the dismissal of one of his two robbery convictions, which constitute his two prior "strikes." On the record presented, we cannot conclude that the conduct of his trial counsel fell below "'an objective standard of reasonableness'" or that a *Romero* motion was reasonably likely to be successful. (*People v. Jennings*, *supra*, 53 Cal.3d at p. 357.) That appellant received a suspended sentence for the robberies is an inadequate basis for seeking their dismissal. As Witkin and Epstein explain, the determination that a prior felony is a

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9 As appellant did not raise a *Romero* motion at trial, he has forfeited any contention that the trial court erred in failing to strike a prior conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376.)

"strike" for purposes of the Three Strikes law "is not affected by suspension of imposition of judgment or sentence [or] stay of execution of sentence." (3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 357, p. 463; §§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Nor would the relatively minor nature of the robberies -- if that was, in fact, the basis for the suspended sentence -- mandate their dismissal in view of appellant's criminal history, gang membership, and current convictions. (See *People v. Thorton* (1999) 73 Cal.App.4th 42, 47 [trial court abuses discretion in dismissing two prior burglaries on the ground they involved small sums of money without giving due weight to defendant's history and recent violent offense].)

Pointing to *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*) and *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*), appellant argues that his robbery convictions were "so closely connected" as to oblige the trial court to dismiss one of them (*Benson, supra*, 18 Cal.4th at p. 36, fn. 8). In *Benson*, our Supreme Court held that a serious felony conviction for which punishment is stayed pursuant to section 654 constitutes a "strike" for purposes of the Three Strikes law. (*Benson*, *supra*, 18 Cal.4th at p. 36.) In a footnote, the court stated: "Because the proper exercise of a trial court's discretion [to dismiss a prior 'strike'] necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected -- for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct -- that a trial court would abuse its discretion . . . if it failed to strike one of the priors." (*Id*. at p. 36, fn. 8.) Subsequently, in *Burgos*, the defendant was convicted of robbery and aggravated assault, and sentenced under the Three Strikes law on the basis of prior convictions for attempted carjacking and attempted robbery. (*Burgos*, *supra*,

117 Cal.App.4th at pp. 1211-1213.) Relying on *Benson*, the appellate court concluded that the trial court erred in declining to strike one of the prior convictions, reasoning that they "arose from a single criminal act," and that the defendant's criminal record otherwise involved only minor offenses. (*Burgos*, at pp. 1214-1217.)

Unlike *Benson*, the record does not establish the relationship between appellant's robbery convictions, aside from the fact they were charged in a single action. When, as here, a claim of ineffective assistance is raised on appeal and the record does not disclose on its face that there is no satisfactory explanation for counsel's conduct, we will not find reversible error.[10] (*People v. Avena* (1996) 13 Cal.4th 394, 418.) In sum, appellant has failed to show that he received ineffective assistance of counsel.

C. *Sentencing Error*

Appellant contends that the trial court's imposition of a 10-year gang enhancement to his sentence for murder (count 1) pursuant to section 186.22, subdivision (b)(1)(C), was improper because he received a 25 years to life term for the offense, which was trebled pursuant to the Three Strikes Law. He is correct. In *People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1011, our Supreme Court held that when, as here, a defendant is sentenced to a term of 25 years to life for a gang-related murder (absent the operation of the Three Strikes Law), he is not subject to the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), but instead falls within the scope of the section 186.22, subdivision (b)(5), which

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10 "'Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus.' [Citations.]" (*People v. Avena*, *supra*, 13 Cal.4th at p. 419, italics omitted.)

mandates the imposition of a 15-year minimum parole eligibility period. Respondent concedes that the trial court erred.

As the court explained in *Lopez*, although the term of 25 years to life for the murder sets a longer minimum period of incarceration than subdivision (b)(5) of section 186.22, a true finding under subdivision (b)(5) may guide the determination of the Board of Prison Terms in setting the defendant's release date. (*Lopez, supra*, 34 Cal.4th at p. 1009.) We therefore order the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) stricken, and order the judgment modified to reflect that under count 1 the jury found true the gang allegation (§ 186.22, subd. (b)(1)) for purposes of the the minimum parole eligibility period (§ 186.22, subd. (b)(5)).

D. *Cruel and Unusual Punishment*

Appellant contends that his sentence of 106 years and eight months to life (as modified above) violates the federal and state constitutional prohibitions against cruel and usual punishment because it is impossible for a human being to serve such a lengthy sentence.[11] He urges us to hold that "a prison sentence in excess of 100 years-to-life is per se unconstitutionally 'cruel and/or unusual' because the sentence cannot be served in [a] lifetime." He relies exclusively on Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, 600-601, advancing the view that sentences exceeding a human lifetime are constitutionally infirm.

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11 Respondent contends that appellant has forfeited this objection by failing to raise it before the trial court. We agree. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Nonetheless, we address the contention on its merits to forestall any claim that appellant's counsel rendered ineffective assistance at trial.

Numerous courts have concluded that such sentences do not constitute cruel and unusual punishment. (See, e.g., *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382 (*Byrd*) [115 years plus 444 years to life]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137 [375 years to life plus 53 years]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [283 years and 8 months sentence for 46 sex crimes against seven victims]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 532 [129 years for 25 sex crimes against one victim].) In *Byrd*, the court stated: "In our view, it is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution. [Citation.] [Citation.]" (*Byrd, supra,* 89 Cal.App.4th at pp. 1382-1383.) We conclude that appellant's sentence violates neither the state nor federal ban on cruel and unusual punishment.

DISPOSITION

The judgment is modified under count 1 (murder) to reflect that the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) is stricken, and that the jury found true the gang allegation (§ 186.22, subd. (b)(1)) for purposes of the minimum parole eligibility period (§ 186.22, subd. (b)(5)). In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect the modifications to appellant's sentence under

count 1, and to forward a copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.